

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLIN DEVON HOLLAND,

Defendant-Appellant.

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UNPUBLISHED  
September 7, 2004

No. 247038  
Wayne Circuit Court  
LC No. 02-010683

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant Marlin Devon Holland appeals by right from his conviction by a jury of the following: armed robbery, MCL 750.529; assault with intent to murder, MCL 750.83; possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. The convictions resulted from the robbery of a Mobil gas station. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant first asserts that the trial court abused its discretion by admitting subsequent acts evidence in the form of video surveillance photographs that were, according to defendant, unfairly prejudicial and outcome-determinative. The evidence related to defendant having entered a Sunoco gas station and then a Fast Track convenience store, where he allegedly committed a robbery. Defendant timely challenged the admission of subsequent acts evidence during a pretrial evidentiary hearing.

Whether to admit or exclude evidence of other bad acts is within the sound discretion of the trial court, and this Court will not disturb the decision absent a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

The trial court did not abuse its discretion by admitting the subsequent acts evidence because it tended to make the material issue of defendant's identity more probable, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

MRE 404(b)(1) safeguards a defendant from the prosecution's use of evidence of other crimes, wrongs, or acts to prove the defendant's propensity to commit a charged offense. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Prior or subsequent acts

evidence is admissible, however, under MRE 404(b)(1), “*whenever* it [other acts evidence] is relevant on a noncharacter theory.” *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994) (emphasis in original). The Court in *VanderVliet* provided the preeminent framework for determining the admissibility of other acts evidence in all instances except when the proponent offers other acts evidence to prove the identity of the accused through modus operandi. *People v Smith*, 243 Mich App 657, 671; 625 NW2d 46 (2000), remanded on other grounds 465 Mich 931 (2001).

Our Supreme Court’s decision in *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), identifies the four requirements of logical relevance when the proponent uses a modus operandi theory to prove identity: (1) there exists substantial evidence that the defendant actually perpetrated the similar act sought to be introduced, (2) some special quality or circumstance of the act tends to prove the defendant’s identity, (3) identity is material to the determination of the defendant’s guilt of the charged offense, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Although this Court should assess the trial court’s admission of subsequent acts evidence using the framework espoused in *Golochowicz*, the Court’s finding in *Golochowicz* that “the presumptive direction of the trial court’s exercise of discretion should be toward excluding the evidence” has been supplanted by the presumption toward admission espoused in *VanderVliet*. *Golochowicz*, *supra* at 326; *VanderVliet*, *supra* at 64-65.

Applying *Golochowicz*’s first requirement of logical relevance, the record reflects that the prosecution offered evidence sufficient to show that defendant actually perpetrated the similar acts, as the prosecution need only provide evidence sufficient to convince the jury of the probability of the defendant’s actions. *People v Duncan*, 402 Mich 1, 14; 260 NW2d 58 (1977).

During trial, the prosecution offered the testimony of Dearborn police officers who executed a valid search of defendant’s residence and found a box of ammunition matching the caliber recovered from the scene of the subsequent uncharged armed robbery. Dearborn police also recovered clothing matching the description of defendant given by the clerk of the Sunoco station that defendant entered just prior to the commission of the subsequent robbery. This testimony was supported by surveillance images of a man fitting defendant’s description wearing the recovered clothing at both the Sunoco store and the scene of the subsequent robbery. Reviewed collectively, the evidence offered by the prosecution provided a sufficient basis to show that defendant committed the uncharged armed robbery.

*Golochowicz*’s second requirement necessitates a special quality of both the uncharged and charged offenses that creates a link between them, assuring that evidence of the separate act is probative of identity and not merely of the defendant’s bad character. *Golochowicz*, *supra* at 310. The record reflects that the perpetrator of both the uncharged and charged robberies was armed with a silver automatic handgun. The perpetrator of these crimes targeted gas stations with only one attendant present. In both instances the perpetrator purchased a small item as a ploy to cause the attendant to open the cash register. Once the register was opened, the perpetrator demanded the contents of the register and, after the perpetrator received the money, he proceeded to shoot the passive attendants. Police evidence technicians recovered shell casings at both scenes, and all five of the shell casings were twenty-five caliber. Based on the evidence of the substantially proven uncharged crime, and the substantially similar modus

operandi employed in the charged robbery, it was not error for the trial court to permit the jury to infer that both crimes were the “handiwork of the same person.” *Golochowicz*, *supra* at 311.

MRE 404(b) does not require other acts evidence to be similar to the charged offense except when the basis for its relevancy is the similarity between the two events. *VanderVliet*, *supra* at 70 n 23. The basis for the relevancy of the subsequent acts evidence indeed was the similarity between these events and the charged robbery three weeks prior, and this similarity was substantially proven to forge the link necessary to make this evidence probative of defendant’s identity.

Thirdly, the question of identity must be material to the determination of the defendant’s guilt of the charged offense. *Golochowicz*, *supra* at 309. A material fact is one that is “within the range of litigated matters in controversy.” *Sabin*, *supra* at 57 (internal citations and quotations omitted). The question is relevancy to a fact in issue, and when that can be reliably determined before trial, the trial court may determine admissibility. *VanderVliet*, *supra* at 70. Here, the trial court determined the admissibility of the other acts evidence in pretrial proceedings, explaining, “I’m going to allow other acts performed by the defendant, because the prosecutor acknowledges that identification is an issue in this case because it’s been raised by the defense.” Defendant’s identity proved to be the primary issue of dispute during trial; it is therefore logically relevant to the determination of defendant’s guilt with respect to the Mobil robbery.

“The fourth prong of *Golochowicz* is merely a restatement of the Rule 403 test applied to all evidence to determine its legal relevance.” *VanderVliet*, *supra* at 71. MRE 403 allows for the exclusion of otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. The Court in *VanderVliet* rejected the notion that any “superannuated weighing requirement” be employed by a trial court in weighing the probative value of other acts evidence against the probability of unfair prejudice to the defendant. *VanderVliet*, *supra* at 72; see also *Sabin*, *supra* at 57 n 5.

Here, the trial court correctly admitted the subsequent acts evidence because its probative value regarding defendant’s identity was not substantially outweighed by the danger of unfair prejudice as examined under MRE 403. Moreover, the trial court’s inclusion of a limiting instruction in accordance with MRE 105 (which the jury is presumed to follow, see *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 [1998]) and the prosecution’s notice in advance of trial in accord with MRE 404(b)(2), restricting the use of the other acts evidence to proof of identity by means of modus operandi, reduced the danger of unfair prejudice.

While defendant is correct in stating that no offense occurred at the Sunoco station, the trial court’s admission of surveillance stills and the testimony of the Sunoco clerk did not amount to an abuse of discretion. The Sunoco evidence was part and parcel to establishing the identity of defendant as the perpetrator of both the charged and uncharged robberies by way of modus operandi. The Sunoco evidence was used to establish defendant’s identity by way of his modus operandi of assaulting lone attendants after the cash register was opened. The Sunoco evidence showed that this is what indeed occurred at the scene of the uncharged robbery minutes later; the theorized reason for the non-occurrence of a robbery at the Sunoco station was due to the presence of more than one person behind the store counter.

Defendant next argues that the trial court improperly denied admission of a composite drawing as being hearsay and confusing to the jury. Defendant timely challenged the trial court's exclusion of the composite drawing during trial.

A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. *People v Bulmer*, 256 Mich App 33, 34; 662 NW2d 117 (2003). An abuse of discretion occurs when an unprejudiced person would say that the trial court's ruling was unjustified or inexcusable, after a consideration of all the facts on which it based its ruling. *Id.*

The trial court did not abuse its discretion by excluding demonstrative evidence in the form of a composite drawing, discerning that such evidence would be confusing and unbeneficial to the jury so as to substantially outweigh its probative value because the jury's potential inability to distinguish such evidence as purely demonstrative was reasonably likely.

Defendant argues for the admissibility of the composite drawing on the basis that the drawing demonstrates fundamental characteristics that differ from defendant's physical appearance as identified by the victim and does not itself constitute a photographic representation. The trial court denied the presentation of the drawing to the jury primarily because defendant could not produce additional testimony that would have explained the difference between a composite drawing and a photograph to the jury. The trial court therefore found the probative value of the drawing substantially outweighed by the danger of confusing the issues or misleading the jury. MRE 403.

Although the demonstrative evidence of the composite drawing was relevant to the material issue of identity in the trial, and thereby admissible under MRE 402, demonstrative evidence does not escape scrutiny under MRE 403. *People v Castillo*, 230 Mich App 442, 444-447; 584 NW2d 606 (1998). Defendant failed to secure the composite sketch artist as a witness and thus could not offer testimony explaining to the jury the difference between a composite drawing and an accurate portrait of the perpetrator; therefore, a "reasonable likelihood that the jury [would] fail to understand the demonstrative nature of the evidence" existed. *Castillo, supra* at 445. The trial court's exclusion of the composite sketch was not inexcusable or without justification; therefore the trial court did not abuse its discretion. *Bulmer, supra* at 34.

Defendant next argues, in a supplemental brief, that the trial court clearly erred by failing to suppress witness identifications that occurred during a pre-custodial photographic lineup in which defendant's counsel was not present. Defendant moved to suppress the identification testimony during an evidentiary hearing.

"The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Harris*, 261 Mich App 44, 51; 680 NW 2d 17 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

The trial court's decision to deny defendant's motion to suppress the identification testimony was not clearly erroneous, because defendant had no right to counsel at the pre-custodial identification procedure. In addition, defendant has failed to show that the photo array used was impermissibly suggestive; therefore, the trial court's denial of defendant's motion to suppress was proper.

An accused's Sixth Amendment right to counsel extends to all critical stages of the criminal proceeding. *People v Kurylczyk*, 443 Mich 289, 296; 505 NW2d 528 (1993). The United States Supreme Court has held that the use of a photographic array for the purpose of allowing a witness to attempt to identify the offender, in a situation in which the accused is not physically present and not in custody, is not a 'critical stage' of the proceeding requiring the safeguards of the Sixth Amendment. *Id.* at 297.

Defendant primarily relies on the proposition from this Court's decision in *People v Cotton*, 38 Mich App 763, 769; 197 NW2d 90 (1972), that, in Michigan, certain circumstances may arise in which an accused would be entitled to representation during a photographic identification proceeding, even though the accused was not then in custody. Specifically, defendant argues that *Cotton* expands the scope of entitlement to Sixth Amendment safeguards to cases in which a suspect becomes the "primary focus" of a police investigation.

However, *Cotton*'s focus test "has never been applied . . . to a precustodial, investigatory photographic identification." *Kurylczyk, supra* at 300. Moreover, the Court definitively stated in *Kurylczyk* that because it is impossible to know at the early stages of an investigation whether a photographic array will either "'build a case against the defendant'" or "'extinguish a case against an innocent bystander,'" the appointment of counsel is neither necessary nor feasible during investigatory photographic lineups until custody attaches. *Id.*, at 302, quoting *Cotton, supra* at 769-770. "On the basis of *Kurylczyk*, the focus test is no longer applicable." *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994).

In addition, the unusual circumstances found in the *Cotton* decision do not exist in the present case; therefore, defendant was not entitled to the Sixth Amendment right to counsel during the two pre-custodial photographic identification proceedings. See *id.* at 472-473. The defendant in *Cotton* had previously been placed in police custody and subjected to lineups while in custody and under advisement of counsel. *Cotton, supra* at 770. In contrast to the defendant in *Cotton*, defendant here was not taken into custody before the contested lineups. Nor is there any evidence that the witnesses at the lineups had previously identified defendant for the authorities. See *McKenzie, supra* at 472. We conclude that no unusual circumstance presents itself that would permit this Court to stray from our Supreme Court's binding precedent in *Kurylczyk*, which drew the line for representation during a photographic lineup at the point of custody. *Kurylczyk, supra* at 302.

Defendant further contends that the lineup procedure itself was improper.<sup>1</sup> To obtain relief, he must show that, in light of the totality of the circumstances, the procedure used in the photographic identification was so unduly suggestive as to have led to a substantial likelihood of misidentification. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

When examining the totality of the circumstances, relevant factors include: the opportunity for the witness to view the criminal at the time of the crime, the

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<sup>1</sup> Although the photographic lineup was shown to two individuals, defendant focuses his "undue suggestiveness" argument on the identification of defendant by witness Robert Gonzalez.

witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation. [*Id.* at 304-305.]

Applying the pertinent factors, the record reflects that the witness had the opportunity to view defendant both before and after the charged robbery on July 17, 2002. The witness testified that he viewed an African-American man arrive at the Mobil station in a light colored car, that he watched this man with a goatee put on a tan baseball cap, and that he made eye contact with this man from about twenty-five feet away. The Chief of the Dearborn Heights Police Department testified that he produced a photo array of six men that included a photo of defendant in addition to a photograph of defendant taken from the surveillance still at the Sunoco station. The witness, a fourteen-year-old boy, viewed this array in the presence of a guardian and “instantaneously” identified defendant as the man he saw at the scene of the charged robbery. The reliability of the photographic lineup identification was bolstered because it occurred only three weeks after the charged robbery occurred. *Kurylczuk, supra* at 308 n 13.

As for the photographic array itself, the record indicates that the array was produced using defendant’s photograph from the Sunoco surveillance camera in which he appeared to have a shaved head and full beard. The photo array contained six color, head-and-neck photographs, with equivalent backgrounds, of African-American males, each with short haircuts and some form of facial hair, although defendant was the only individual with a full beard and shaved head. Because the other individuals had short haircuts and facial hair, and defendant’s photograph had no other distinguishing external characteristics that would cause the witness to select him from the others in the array, we conclude that the composition of the photographic lineup itself did not render it impermissibly suggestive. See, generally, *Kurylczuk, supra* at 303-305.

Defendant asserts that the witness’s identification at the photographic lineup was improperly influenced by the television broadcast of the surveillance still and by viewing a separate copy of the broadcasted still at the time of the lineup. Despite the potentially suggestive influence of a television broadcast, defendant’s conclusion that the witness’s identification of defendant’s photograph was made solely on the basis of viewing the broadcasted surveillance still on television and by way of the individual copy is unsubstantiated by the record. Based on the totality of the circumstances surrounding the witness’s identification, it is not evidenced that a substantial likelihood of misidentification occurred. Therefore, the trial court did not clearly err in denying defendant’s motion to suppress the relevant identification testimony. *Kurylczuk, supra* at 310. Because the photographic array was not impermissibly suggestive, the in-court identification of defendant was not tainted. *Id.* at 311.

Affirmed.

/s/ Jane E. Markey  
/s/ Kurtis T. Wilder  
/s/ Patrick M. Meter